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No. 07-152

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

JAMES T. WALKER,

Petitioner,

v.

CENTRE INSURANCE COMPANY and
ZC STERLING INSURANCE AGENCY, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The Maryland Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision of the Maryland Court of Appeals should be reviewed and not be allowed to stand because it incorrectly suggests that the highest court in the State of Maryland, in its deliberations, can: 1) violate the Fourteenth Amendment to the U.S. Constitution by not considering the requirements set forth under Maryland's the Administrative Procedures Act and Maryland Insurance Administration's (MIA's) own regulations codified in Code of Maryland Regulations (COMAR) and 2) depart from the accepted and usual course of judicial proceedings by not adhering to common canons of statutory construction and interpretation. Furthermore, the decision should not be allowed to stand because it is incorrect.

Petitioner seeks this Court's review of three main issues. First, whether the Maryland Court of Appeals violated his due process rights pursuant to the Administrative Procedures Act (APA) Md. Code Anm., State Government § 10-201 and MIA's own regulations codified in Code of Maryland Regulations (COMAR), when it failed to determine whether he filed his petitions within 30 days from delivery of the MIA orders and whether the date he received the orders was the effective date. Second, whether the lower Court erred in utilizing Maryland Insurance Article §2-204 (c) as the operative statute for service of MIA orders resulting from administrative hearings. Third, whether, pursuant to Maryland Insurance Article §2-215 and COMAR regulations §§31.02.01.05B and 31.02.01.05C, the 30-day filing period for a petition for judicial review begins to run on the date the MIA order resulting from the hearing is mailed to or received by the affected party.

ARGUMENT

I. The Supreme Court Has Jurisdiction to Grant this Petition.

A. Petitioner was Denied His Due Process Rights at the Maryland Court of Appeals Level.

Respondents' assertions are wrong and mischaracterizes Petitioner's claims. Petitioner did not claim that his due process rights were violated at the Agency and Circuit Court Levels. He claimed that his federal due process violation arose from the Maryland Court of Appeals' decision. Pet 7-10. Pursuant to §10-221(b)(2) of Maryland's Administrative Procedures Act, a written statement of appeal rights must be included in the final order stating when the affected party should file an appeal. He asserts that that Court passed over the notice of appeals rights statement that he received and failed to determine as to whether he timely filed his petitions within 30 days after receiving the notice. Petitioner also claims that his due process rights were violated pursuant to COMAR Regulations §§§ 31.02.01.05B, 31.02.01.05C and 31.02.01.12. Pet 7-10. He asserts that, since MIA sent the orders by mail and he produced uncontroverted evidence showing when they were received, he was due a determination from the Court of Appeals of Maryland as to whether the date he received the orders was the effective date for filing a petition for judicial review in the Circuit Court. The Maryland Court of Appeals ignored these regulations in its final analysis, although they were raised and discussed in the Petitioner's brief and during oral arguments. The Maryland Court of Appeals recognized but essentially passed over the notice of appeals rights statement and concluded that the statement did not change its "analysis of the statutory law."

Petitioner was only able to find one case to support his due process claim. *Plocher v. Commissioner of Public Safety Plocher v. Commissioner of Public Safety*, A03-1572, 681 N.W.2d 698 (Minn. App. 07/29/04).

In *Plocher*, the Respondent Commissioner of Public Safety revoked appellant Mark Allan Plocher's driver's

license after police stopped Plocher for a traffic violation and a urine sample tested positive for controlled substances. The commissioner mailed Plocher a notice and order of revocation. The notice contained, in relevant part, the following statement:

> " Petition for Judicial Review-You have the right to petition for a judicial review. Petitions must be filed in writing as outlined *MINNESOTA STATUTE,SECTION 169A.53, SUBDIVISION, 2*, in the county in which the incident occurred and within 30 days from receiving a notice and order of revocation...."

Plocher's due-process claim was that he was misled by the incorrect statement in the notice that he had 30 days after receiving the notice to petition for judicial review. The *Plocher* court agreed and concluded that:

> "After the commissioner notified Plocher that he had 30 days from receiving notice of revocation to file a petition for judicial review of the revocation, it would be indefensible to allow Plocher's petition for review to be dismissed as untimely solely because it was not filed within 33 days after the notice was mailed. At a minimum, Plocher is entitled to a determination whether he filed his petition for review within 30 days after he actually received the notice and order of revocation. We, therefore, hold that dismissing Plocher's petition for judicial review as untimely because the petition was not filed within 33 days after the notice of revocation was mailed violated Plocher's right to due process of law, and we remand to permit the district court to determine whether Plocher served and filed his petition within 30 days after receiving the notice and order of revocation."

In the present case, pursuant to the Administrative Procedures Act, the administrative law judges mailed

Petitioner a notice and final order. The notice indicated that he had within 30 days of delivery of the notice to file a petition for judicial review of the decision. Because of that time requirement, he was due to a determination from the Maryland Court of Appeals as to whether he filed his Petitions in a timely manner.

B. The Supreme Court Can Entertain Petitioner's Due Process Claim, Since it Involves Plain Error Unchallenged in the State Court.

The Respondents have a valid argument with respect to the timely presentation requirements for issues in the lower courts. However, it is well established that this Court has jurisdiction to review cases involving plain error unchallenged in the state court when necessary to prevent fundamental unfairness and injustice. *Wood v. Georgia, 450 U.S. 261, 265, n. 5 (1981).* See also, *Vachon v. New Hampshire, 414 U.S. 478 (1974.* This Court has also recognized exceptions to the timely presentation requirement where the "question is created by an unexpected decision of the highest state court, "Stern and Gressman p. 183. Petitioner asserts that his due process claim is ripe for review because the Maryland Court of Appeals clearly erred in this instance.

C. Even assuming, arguendo, that Petitioner did not Timely Raise His Federal Due Process Claim, Respondents did not Refute and Concedes that the Maryland Court of Appeals Construed §§2-204 and 2-215(d)(1) of the Maryland Insurance Article in a Manner Which Requires this Court's Review

This Court still has jurisdiction to review this case because of how the Maryland Court of Appeals construed §§2-204 and 2-215(d)(1). It is well established that this Court has jurisdiction to review cases when courts have so

departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Sup Ct. Rule 10 (a). In addition to his due process rights claim, Petitioner asserts that the Maryland Court of Appeals, in its deliberation, failed to adhere to common cannons of statutory construction and interpretation and reached its conclusion through faulty analysis. Pet 10-16.

In their reply brief, Respondents' opposition to Petitioner's many claims is most notable for what is concedes. First, Petitioner claims, but Respondents do not dispute, that the Maryland Court of Appeals' decision conflicts with and renders superfluous relevant Maryland Insurance Statutes and COMAR Regulations. The long standard canon that "statutory text should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory," was not adhered to by the Maryland Court of Appeals when its ruling made the phrase in §2-215(a)(1) "may be taken only from an order resulting from a hearing" and the phrase in §2-215(d)(1) "to serve on the person entitled to receive it" nugatory. *Collins v. State,* 383 M d. 684, 688, 861 A.2d 727, 730 (2004) Pet 10-12. The canon was also not adhered to when the Court's ruling made the phrase "service of notices, orders and other documents is effective upon receipt" and the phrase " the final order is effective when issued unless a different date is specified in the decision" nugatory. Pet 13-14. Second, Petitioner claims but Respondents do not dispute that the Maryland Court of Appeals failed to go beyond the words of the relevant insurance statutes to determine legislative intent with regards to the use of Insurance Article §2-204(c) in the context of 2-215(d)(1). *Collins v. State,* 383 M d. 684, 688, 861 A.2d 727, 730 (2004); *Deville v. State,* 383 Md. 217, 223, 858 A.2d 484, 487 (2004). The briefs filed by each party, the Maryland Court of Special Appeals ruling and the oral arguments presented before the Maryland Court of Appeals indicated clear differences between the parties in their interpretations

of how the above statutes were to be applied. However, despite these apparent differences, that Court failed to use all the resources and tools of statutory construction that were available to it to construe and interpret the law, such as, other provisions of the Insurance Article, the COMAR provisions, MIA procedures, and the oral arguments. Third, Petitioner claims but Respondents do not dispute that the Maryland Court of Appeals read into the Insurance Article what the Legislature apparently left out. That Court's ruling was based on the argument that requiring "service" under the article could lead to unreasonable or illogical results, because service might never be accomplished." Pet App. 7-10. There are no provisions in the Insurance Article to address this issue. By making this assumption that the Legislature intended that the statutes provide for situations when the affected party is not served a notice, the Maryland Court of Appeals violated a standard canon which prohibits it from assuming the authority to read into an act what the Legislature apparently deliberately left out. *Price v. State,* 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003); *Goff v. State,* 387 Md. 327, 342, 875 A.2d 132, 141 (2005); *Pete v. State,* 384 Md. 47, 57 -58, 862 A.2d 4 19, 425 (2004). Fourth, Petitioner claims but Respondents do not dispute that the Maryland Court of Appeals' decision to use of 2-204(c) as the operative statute for service of orders resulting from hearings under the insurance article leads to illogical or absurd results. The standard which stipulates that courts should "avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense was not adhered to by the Maryland Court of Appeals. *Blake v. State,* 395 Md. 213,224,909 A.2d 1020, 1026 (2006). Applying its construction utilizing §2-204(c) for cases involving homeowners or persons who normally don't or would not be expected to have a place of business, would lead to absurd and illogical results. The statute does not allow for service of orders resulting from hearings to homeowners who do not own a place of business and therefore these

individuals would never be served. Finally, Petitioner claims and Respondents apparently do not dispute that the Maryland Court of Appeals' decision conflicts with the purpose and intent of Maryland Rule 7-203 as a whole. When that Court's ruled that §2-204(c) of the insurance article provides an exception to 7-203(a)(3), in that the time period for filing a petition for judicial review of an order resulting from hearings begins when the order is *mailed*, not when it is received. Section 2-204(c) was not meant to provide time requirements for filing a petition for judicial review in the Circuit Court. It was meant to provide for methods to be used for service of orders [compliance].

II. THIS PETITION DOES NOT QUESTION THE MARYLAND COURT OF APPEALS' AUTHORITY OVER MARYLAND STATE LAW

A. Petitioner Questions the Manner by Which the Maryland Court of Appeals Interpreted the Law.

Petitioner does not question the Maryland Court of Appeals' authority over Maryland State Law, he questions the manner by which it construed and interpreted the law. As stated in the above, he asserts, and the Respondents did not refute, that the Maryland Court of Appeals construed §§2-204 and 2-215(d)(1) of the Maryland Insurance Article in a manner which requires this Court's review. The Court did not adhere to the common canons of construction and interpretation and presented a faulty analysis.

B. Respondents Assertion that Petitioner did not Raise Arguments Pertaining to the Two Insurance Statutes and Maryland Regulations before the Maryland Court of Appeals below is Incorrect.

The records from the Court below clearly show that Petitioner did raise arguments pertaining to the two insurance statutes and Maryland Regulations before the Maryland

Court of Appeals. The relevant issues that he asked that Court to reconsider, in his "Motion for Reconsideration and Modification of Opinion," are listed below:

1. Whether it erred in utilizing §2-204 (c) of the Insurance Article as the operative statute for service of MIA orders resulting from hearings of contested cases;

2. Whether it did not adhere to this Court's own canons of statutory interpretation and construction;

3. Whether its ruling conflicts with and renders §2-204(c) as whole, §2-204(c)(2), §2-215(a)(1), §2-215(d)(1) of the Insurance Article and COMAR Regulations §§§ 31.02.01.05B, 31.02.01.05C and 31.02.01.12 superfluous and leads to illogical and absurd results;

C. Respondents' Assertions that Petitioner Cited §2-204 of the Insurance Article in his Question Presented to the Maryland Court of Appeals is Incorrect.

Respondents' statement that Petitioner cited 2-204 (c) in his question is totally false and it shows a complete disregard for the truth. The Respondents filed a Petition for Certiorari to the Maryland Court of Appeals, not the Petitioner, (See Opposition brief, pg 2, App.) and they were the ones who presented the above question for review. Petitioner never cited §2-204 in the question he presented to the Maryland Court of Appeals below. The records will also show that Petitioner opposed Respondents' Writ for Certiorari and raised objections to that question in his opposition brief and during oral arguments before the Maryland Court of Appeals. In his opposition brief and during oral arguments, Petitioner asked the Maryland Court of Appeals to consider the following question instead:

> "Was the Court of Special Appeal correct as a matter of law when it held that the thirty-day perio d for filing a Petition for Judicial Review of an administrative

decision of the Maryland Insurance Administration begins when the petitioner receives the notice of the order or decision."

D. The Maryland Court of Appeals Decision Below is Incorrect.

The plain language of Maryland Insurance Articles §§2-215 and COMAR regul ions §§31.02.01.05B and 31.02.01.05C could not be more clear. Section 2-215 (a)(1) states, in relevant part, that:"an appeal under this subtitle may be taken only from an *"order resulting from a hearing."* Section 2-215 (d)(1) governs the time requirements for filing a petition for judicial review of the orders with the appropriate circuit court---"within 30 days after (1) the order resulting from the hearing was *served on the persons entitled to receive it*." COMAR Regulations §§31.02.01.05B and 31.02.01.05C provides the "service" requirements for orders resulting from hearings under the statutory scheme of Title 2 of the Insurance Article. The plain language of these regulations is clear and unambiguous and reflects the intent of the Legislature. The COMAR regulations stipulate clearly that "service" of orders may be accomplished by many methods, but is *" effective upon receipt."*

The plain language of Maryland Insurance Articles §2-204(c) could also not be more clear. The legislature is presumed to have meant what is said and said what it meant in providing service requirements for orders [compliance] under this statute *Arundel Corp. v. Marie,* 383 Md. 489, 502, 860 A.2d 886, 894 (2004). The Maryland Court of Appeals use of §2-204 (c) of the Insurance Article as the "operative" statute for service of orders resulting from hearings is misplaced. The statute stipulates that non-hearing or compliance orders may be served by mailing or delivery them, not just mere mailing, as implied by the Maryland Court of Appeals' ruling. COMAR regulation

§31.02.01.05BC stipulates that orders resulting from hearings are effective only upon receipt.

Respondents and the Maryland Court of Appeals rely on that Court's decisions in Renehan v. Publich Serv. Comm'n of Maryland and Lee v. State, where it held that because the term "service" does not automatically require or imply receipt,." §2-204 (c) defines "service" as mere *mailing*. Renehan v. Public Serv. Comm'n of Maryland, 231 Md. 59, 188 A.2d 566 (1963). Lee v. State, 332 Md. 654,632 A.2d 1183 (1993). Petitioner disagrees and argues that the use of these two cases to analyze §2-204 (c) is misplaced. Their results do not dictate the outcome here. In both *Renehan* and *Lee*, as the Maryland Court of Appeals concluded, "there is no requirement of receipt of the notice to be effective." However, in this case, the requirement of receipt of orders resulting from hearings is found in the COMAR Regulation, specifically in §31.02.01.05C.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioner respectfully submit that his Petition for a Writ of Certiorari should be granted. Petitioner also submit that summary reversal of the Maryland Court Of Appeals decision is appropriate in this case.

RESPECTFULLY SUBMITTED, this 23 day of September 2007.

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